No. 8843

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWIFT AND COMPANY (a corporation),
Appellant,

vs.

HARRY J. GRAY,
Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Contained in the Appellant's statement of the case, in its opening brief, is a subdivision entitled, "Statement of the Facts". This statement of facts is in the main correct. We would observe, however, that it contains a number of conclusions of the Appellant which are not statements of fact.

This case on its facts is rather simple. The Plaintiff had been employed by Swift and Company for some time, and when the events with which this case is concerned occurred was performing the duties of a driver of one of Appellant's trucks, selling produce from the truck.

Although there was a Company rule that such drivers were to turn in their cash, sales slips and

collection books at the end of each day's work to the cashier, Plaintiff did not observe this rule, for the reason that as to him the rule was unworkable, for proper facilities were not afforded so he could adhere to it.

When Plaintiff would return at the end of his day's labors, the cashier was seldom, if ever, present and no acquittal of responsibility for his collections and records could be obtained by him. He, therefore, for some time had been used to taking the collections and records home, in order not to leave them unattended for any greater length of time than necessary. He customarily went back on his run in the morning a short time before the cashier appeared, but would put the envelope containing the money and records over the partition and within the cashier's locked cage, where the cashier would receive them when he came on the work, and later the cashier would give plaintiff the customary receipt.

This practice had been followed some six or seven months before the events happened with which this case is concerned. (R. 76, 159 and 160.)

On Saturday morning, October 13, 1934, Gray placed in the cashier's cage his collection book and an envelope containing his collections and sales slips for the previous day. (R. 76.)

That afternoon, when he had returned from his morning run, the cashier asked him where his Friday's collections were, saying he had not received them. A search was thereupon instituted, but did not disclose the missing articles.

Since Plaintiff was about to go on vacation for two weeks, and not wishing to disrupt his plans, he made out from memory for his superior, Mr. Everett, who was acting then as head of the sales department, a list of customers whom he had sold to, the amount of their purchases and payments, and proceeded on his vacation.

It was while he was gone that the slanderous utterances were spoken concerning him.

His place was taken on his route by Harbinson, and Everett gave to Harbinson the list prepared by Plaintiff, instructing him to make a check-up from the list, and Harbinson, while engaged in doing that, made the statements concerning Plaintiff which are set forth in Appellant's statement of the facts.

While Harbinson was so engaged, and before he had completed his check-up, Mr. Hartl sent another employee, Mr. Gould, out, who took over the work of checking, and Mr. Gould likewise made slanderous statements during the time he was engaged in that work.

The statements made are so clearly slanderous, if false, that little need be said upon that point.

When Plaintiff came back from his vacation, expecting to go back on his job (R. 80), he was informed by Harbinson that he was to report at the office on Monday morning. He was there received by White, the general manager; Kelly, the sales manager; Everett, the assistant sales manager; and Hamilton, the cashier, and then was directly accused by Hartl, who said: "Gray, besides that money that

was missing the day you left and knew about, we have some twenty or twenty-one other tickets that date as far back as three weeks before you left that have never been turned in. We have it in black and white against you". (R. 81.)

White asked him what he had to say about it. Plaintiff assured them he had been honest. Kelly then took over, and accused Gray of "a buildup for something bigger", and Gray retorted, "You must be crazy, that is just a case of the number not being torn off where the paper was perforated".

They then told him that he had been suspended; that either he make up the deficit, or they would turn him in to the bonding company. (R. 81.)

Gray asked for a chance to prove his innocence, and the reply from Hartl was that they had it in black and white and had it cold. (R. 82.)

Gray asked to look at the files and show them they were wrong. They claimed they had already looked the files over and found all the evidence they wanted, and that Gray could not find anything that would do him any good. He, nevertheless, continued to plead for a right to look through the records. He finally obtained that privilege (R. 82) and went down the Peninsula to see what information he could find to help him clear himself.

When he returned, Hartl demanded that he make out a check for what they claimed he had not turned in. He protested it would be admitting guilt, and was met by the threat that if he did not write out the

check he would be blacklisted with the bonding companies and could not get a job anywhere. (R. 83.)

Under that bludgeoning Plaintiff made out his check, on which he later stopped payment when he was out from under their domination.

He was then told that he was fired (R. 83) and protested that he could convince White that there was a guilty man in their midst somewhere. White asked him who it was and he replied, "It is Jack Hamilton, the cashier". White's response was that he would not even listen to his story as Hamilton was a trusted employee of eighteen years standing.

Plaintiff again asked for a sales job, and was refused. (R. 84.)

In April of 1935, at which time Plaintiff was in Los Angeles, Plaintiff learned, from reading in the paper, that Jack Hamilton, the cashier, was in trouble. (R. 118.) Plaintiff wrote a letter to White (R. 127), stating his understanding that Hamilton's books were under rigid investigation, and requesting the privilege, at his own expense, of coming up and helping to ferret out the truth, asking of White only two things, that right down in his heart White believe him innocent and that now he would listen to his story concerning Hamilton.

White replied (R. 126) that he was surprised at Gray's attempting to reopen the incident as he was under the impression that the Company had satisfied Gray of the fact that he was innocent of any attempt to defraud the Company, and had merely been care-

less in the handling of his accounts. Even at the trial Defendant, through counsel, took the position that Plaintiff made no claim of embezzlement. (R. 113.)

Plaintiff did come to San Francisco and talk with Hartl. (R. 119.) Plaintiff told Hartl he had interviewed Hamilton and accused him point blank of having framed Plaintiff; that Hamilton would not admit it, and said there was no trouble between himself and Swift and Company.

Plaintiff asked Hartl to return the money he had paid them and Hartl refused, unless Hamilton would admit he was the one who stole it. (R. 119.)

Plaintiff was next referred to the Company's attorney, Mr. Smart, who, in turn, referred him to Hamilton's attorney, this resulting in a visit to Hamilton in the Redwood City jail. Plaintiff got nowhere and that was the last time he saw Swift and Company. (R. 121.)

We suggest, in passing, that there can be no doubt, and that there was none in the mind of the jury who tried this case, that notwithstanding, after the Hamilton affair came along, the Company then felt that Plaintiff had not been guilty of failing to turn in money, yet when Harbinson and Gould were sent down to make their check-up, the officials of the Company, from top to bottom, so far as the San Francisco management was concerned, were generally of the belief that Plaintiff was an embezzler, feeling that so firmly that they were willing to

bludgeon out of him what they assumed he had taken by threatening to blacklist him with the bonding company.

Everyone knows that such a blacklisting would definitely write finis to the career of anybody who ever expected to occupy a position of trust with any employer.

ARGUMENT.

I.

THE UTTERANCES COMPLAINED OF WERE NOT PRIVILEGED.

Appellant's claim that these utterances were privileged is based upon a claim that they were made within the protection of subdivision 3 of Section 47 of the California Civil Code, that is, they were made by a person interested to one who was also interested and who requested the information.

We think it easy to demonstrate by a consideration of the situation shown by the statement of facts that this claim of privilege is wholly without merit. Plaintiff had made certain sales to and certain collections from a number of customers. His record of those transactions was missing, but there was not then, and there never was at any time, even an intimation that any charge by Swift and Company was to be made against the customers, themselves, that they had not paid the funds, or that any obligation of theirs to Swift and Company was being, or could be, called into question.

Plaintiff knew every customer he had sold to on that day, as to which the records were missing. He even knew the approximate, or, in fact, we may almost say, the actual amounts, of those sales. He made up a list for the Company of the sales and of the amounts, and nowhere has it been shown, or even intimated, that the Company was, as to these collections for sales made, making any claim against the customers. It was purely an intra-company matter.

Plaintiff was a member of the sales department. It was for the sales department to turn over to the auditing department the usual accountings that were required, based upon certain records required to be kept. Because in this instance these records were missing, the sales department was not in position to do that. They wanted, therefore, to complete their records as nearly as the same could be done, and for that reason the list was made out and the sales department undertook to check it in the field.

These things being so, the customers who were to be asked concerning the sales made to them on that day, and the collections made from them, had no interest whatsoever in the check-up. They, themselves, held sales slips given them, the duplicates of which were missing, and those sales slips showed what payments had been made and constituted a complete record, so far as the customers were concerned, given them by the Company, itself, bearing the Company's authorized representative's signature, so that from the customer's standpoint there was neither danger of lia-

bility, in excess of their actual liability, nor need of further records. From that angle, also, then, it may be said that these customers were in nowise interested in the Company's check-up.

Therefore, since the customers were not interested the Code section itself defeats Appellant's claim of privilege.

The point so much stressed in Appellant's brief, that the customers in many instances asked why Harbinson and Gould wanted to see the customers' tags, is entirely pointless, for the mere request for information does not create a privileged occasion. To do that the request must be from one who is interested in the transaction.

We think we may, in our turn, cite authorities which Appellant has itself cited in support of its own position. Take, for instance, the case of *Massee v. Williams,* 207 Fed. 222, cited on page 26 of Appellant's brief, wherein the Court defined a privileged communication as comprehending all bona fide statements in the performance of any duty, whether legal, moral or social.

Clearly, the acts here complained of, the slander here committed, fall entirely without the bounds of that definition of privilege. There was no bona fide statement made. The statement was false, now admitted to have been false. It was not in the performance of any duty, either legal, moral or social.

All that these men need have said in response to the customers' queries as to why they wanted to see the

customers' tags was that the records of the Company were missing.

The Court in the above cited case, further defining a privileged communication, stated it was one made on an occasion which furnished a *prima facie* legal excuse for the making of it, and we submit that definition cannot be fitted to the circumstances here involved.

Again, take the definition of privilege found in *Corpus Juris,* and cited on page 26 of Appellant's brief, which is that such a communication is one made in good faith to another, in order to protect his own interest, or to protect the corresponding interest of another, in a matter in which both are concerned.

These statements were not made to protect the interests of the customers, for they had none that needed protection. Nor were they made in a matter with which the customers were concerned, for they had no concern whatsoever in the matter of whether or not Swift and Company's records were missing in its transactions with them, nor as to whether Swift and Company's money had not been turned in. They, themselves, possessed, and, indeed, were at that moment being asked for the privilege of inspection of, records given them by Swift and Company, rendering them entirely disinterested as to whether or not Swift and Company had duplicates thereof, or had received the moneys these records showed Swift and Company's employee had received from the customers.

Not only had these customers paid, to their own knowledge, these sums, but they had Swift and Com-

pany's undisputed acknowledgment that they had so paid, and it was this very acknowledgment that Swift and Company wanted to see, not because they questioned these documents or had ever pretended that they did, but solely because from them they wanted to complete their own records for their own sales and auditing departments.

Appellant takes issue with this analysis of the facts, as, indeed, it must. It says, "It was, as a matter of business sense, important for Swift to ascertain the facts."

That may be granted, but when they go further, as they must, and say it was equally desirable for the customers that Swift's records properly reflect payments made, they go beyond a rational statement of the situation.

Certainly, there was no social interest of the customers in the records of Swift and Company, no moral issues were involved so far as the customers were concerned; and a clearer case could not be made where there was no legal interest on the part of the customers, since they, themselves, possessed complete and accurate records.

The foregoing discussion, we submit, clearly distinguishes from the present situation such cases as *McLaughlin v. Standard Accident Ins. Co.,* and *Warner v. Missouri Pacific Railway Co.,* relied on in Appellant's brief.

On page 35 of its brief, Appellant takes the position that the question of the existence of privilege

was one for the Court, and supports that claim with citation of authorities.

With this contention we agree. Such was the contention of Appellant at the trial of the case, when over and over again this matter of privilege was argued to the trial Court. Everything said here was likewise said to the trial Court, and abundant argument and citation of authorities, pro and con, were submitted, Appellant contending throughout, as it here contends, that it was for the Court to rule upon the question of privilege. With this contention the trial Court agreed.

This disposes of the question of whether or not there was actual malice, whether or not any corporation can be held for actual malice of its employees, and whether or not the Court erred in failing to give instructions upon the matters of privilege and malice.

No malice was charged in the complaint, nor was sought to be proven at the trial, referring now to that actual malice which will warrant the giving of exemplary damages, and without the pleading and the proof of which exemplary damages cannot be recovered.

As said in *Davis v. Hearst,* 160 Cal. 143:

> "Malice in fact is only material in libel as establishing a right to recover exemplary damages, or to defeat defendants' plea that a publication is privileged."

It is strange that since Appellee made no contentions concerning malice, and offered no proof thereof,

and since Appellant insists that the question of privilege was here one for the Court, with which insistence we agree, that it would still be claiming the Court erred in failing to give instructions on this question of privilege, and the further question of malice. Appellant succeeded in convincing the trial Court that the question of privilege was one entirely for the Court to determine, and therefore is in no position to complain that instructions upon the subject were not given.

On this question of privilege, Appellant finally complains of the giving of two instructions requested by Plaintiff: The first one, that a man intends the natural consequences of his acts; and the other, that in an action for slander the law implies some damage from the uttering of actionable words.

Neither of these instructions mentions malice; they are the usual instructions in cases of tort.

II.

APPELLANT'S EMPLOYEES WERE ACTING IN THE COURSE AND SCOPE OF THEIR EMPLOYMENT IN MAKING THE ALLEGED UTTERANCES.

Appellant's argument here falls into two divisions: First, with respect to Harbinson; and, second, with respect to Gould.

Taking up Harbinson first in our reply, we note that Appellant's argument runs that Harbinson was sent out by Everett, the assistant sales manager, who,

in the absence of Kelly, the actual sales manager, was acting as sales manager. The Company, they say, had given definite instructions to the sales department that when discrepancies or shortages occurred on a route, the sales department had nothing to do with the matter, and such matters were to be referred at once to the auditing department, which immediately took charge. They then conclude that there was no evidence at all that Mr. Everett had any authority in the premises when he sent Harbinson out.

We think that here Appellant chooses to ignore the facts. It is beyond dispute that the sales department, of which Mr. Everett was, during the period in question, the acting head, was concerned with the matter of furnishing to the auditing department proper reports of sales. Therefore, when Everett sent Harbinson out to check the list he had been given by Gray, he was acting for his own department in procuring proper records which they would then furnish to the auditing department. The situation is clearly not covered by the stated instructions.

If it be conceded that the sales department had nothing to do with discrepancies or shortages occurring on a route, still they would have the obligation to furnish records of sales. That department's own records of these particular sales were missing, but duplicates thereof were in the hands of the customers, and it was clearly within the interest of that sales department, and within the confines of the rule or the instructions as stated, that the sales department

complete its records of these sales. That matter is distinct from one of investigating the actuality of shortages and discrepancies, with which the instructions referred to were concerned.

Clearly here the jury had full right and authority to hold, as inferentially it did, that when Everett sent Harbinson out for these records, both Everett and Harbinson were acting within the scope of their employment.

Now, turning to the matter of Gould's authority, Appellant's argument runs that Gould did have authority to check the route for the purpose of ascertaining what moneys had been collected by Gray, but that he had no duty to ascertain the reason for the shortages. Appellant says Gould was authorized merely to take a list of numbers of missing tickets and to find the tickets that bore those numbers. That was, they say, the extent of his duty.

Even if the duties of Gould can be said to be so severely limited, nevertheless those duties alone were broad enough to make his acts in making the slanderous statements he did make clearly within the scope of his authority.

Of course, in discussing scope of authority in a matter of slander, it is never necessary to prove that the responsible superior expressly directed the agent to make slanderous statements at any time. The question is: Were those statements made while in the very act of doing that which the agent had authority to do?

If these slanderous utterances were made while the agent was in the actual performance of his duties touching the matter in question, then the superior is responsible.

In 5 *Thomp. Corp.,* 2d Ed., p. 5441, the rule is stated as follows:

> "The general rule makes the corporation liable for a slander uttered by its agent, while acting within the scope of his employment and in the actual performance of the duties thereof touching the matter in question."
>
> "It is well established that a corporation may be liable for a slander uttered by its agent, and according to the weight of authority it is liable where the slander is uttered by its agent within the scope of his employment and in the performance of his duties in the course of transacting the business of the corporation. The rule governing liability in cases of libel and of slander being regarded as the same, it is not essential to the liability of a corporation that the slanderous words were spoken with its knowledge and approval, or that it ratified the act of its agent or servant."
>
> 14a *Corpus Juris* 779.

In support of the foregoing, Corpus Juris quotes from the case of *Fensky v. Maryland Casualty Co.,* 174 S. W. 416, as follows:

> "There can be no sound reason for saying that a corporation may be liable for libel (a doctrine long recognized) and yet not liable for slander—unwritten libel or defamation of character. Under the modern rule, the corporate shell will not

shield the corporation from the ill effects of the slanderous tongue of its agent, if at the time the agent was transacting for the corporation the business of the corporation, and the slander was uttered in the course of such business—and in connection therewith. As an individual, I cannot go to another individual to adjust an account with him, and in the course of so doing publicly denounce him as a thief. Nor should a corporation, through its agents, be able to thus denounce a citizen, and escape liability."

In *Hypes v. Southern Railway Company,* 21 L. R. A. (N. S.) 873, in a case where a division superintendent uttered slander while examining the time account of an engineer, charging him with stealing from the Company, the Court held that under such circumstances the slander was committed within the course and scope of the agent's employment. The Court said:

"A corporation is liable for slander spoken by its agent while acting within the scope of his employment, and in the actual performance of the duties of the corporation touching the matter in question, although it did not appear that the slanderous words were uttered and published with the knowledge, approval, consent, or ratification of the corporation."

In *Courtney v. American Railway Express Co.,* 24 A. L. R. 128, the following language was used:

"After much discussion and great divergence of opinion, it may be regarded as settled by practical unanimity of text-writers and decided cases, that slander is in the same category with all other

> malicious torts, and that a corporation may be liable for it as well as for any of the others, under like circumstances. * * * A corporation is liable for slander of one of its employees by another in reference to a matter growing out of such contract relation, the matter being one within the duty of the slandering employee to adjust, whether the corporation subsequently ratified the slanderous act of its employee or not. * * * In order to hold the master liable for the tort of his servant, the servant must have been at the time engaged in the discharge of duties intrusted to him in reference to the particular matter in hand, and acting within the apparent scope of his employment."

In the case last quoted from, an engineer at the end of the month had turned in his time report, showing the number of hours he had worked during the month. His claim was disallowed to the extent of $37.00. Upon this matter there was an interview between the engineer and the superintendent, who, during that interview, in the presence of outsiders, called the engineer a thief.

These facts were held to show that the agent was there acting within the scope of his employment.

We think we need not go further with citation of authorities upon this matter. Both Harbinson and Gould, as we have heretofore said, were sent out to check the list of customers to whom the Plaintiff had sold goods. At the time they uttered the slanderous words, they were in the very act of doing that work, and clearly were acting within the actual, as well as the apparent, scope of their authority.

Of course, appellant did not show the Company ratified, approved, consented to or expressly directed the making of these slanderous statements, but under the rule that is not necessary. Probably, there was never a case where a corporation expressly ordered an employee to slander another. Nevertheless, these two men were acting within the scope of their authority and uttered these words in the very act of carrying out their work for their superior. Under such circumstances, the corporation is liable.

In closing this part of its brief, Appellant declares that the Appellee is impaled upon the horns of a dilemma, between privilege and authority.

They say that if the statements complained of are so connected with the task of checking the route as to be within the course and scope of the duties of the employees, they were then such a natural part of the task as to be protected by privilege.

In so stating, we submit that Appellant has overlooked a vital element of the defense of privilege, to-wit, that the person to whom the communication is made must himself, or herself, have an interest in the communication.

We are unable to see any dilemma in the case.

III.

THE WORDS UTTERED WERE BOTH FALSE AND DEFAMATORY.

Appellant requested the Court to instruct the jury that the words uttered were not reasonably capable of being understood to mean that plaintiff had been guilty of embezzlement.

Upon this matter, we submit that a reading of the language used in the light of everyday experience and common understanding is a sufficient refutation of this claim.

To charge that an employee is short in his accounts with his employer; that he has been taking his employer's money; and that he has collected money of the employer and has not turned it in, is to charge him with embezzlement.

If authority is needed for so plain a proposition, we refer to *Ecuyer v. New York Life Insurance Co.,* 172 Pac. 359, wherein it was held that statements that the plaintiff "was short in his accounts"; that, in substance, he "had received cash for premiums and did not turn the money in to the Company, nor report it"; that there was "a shortage in his accounts", were slanderous *per se.*

However, we do not think that Appellant's contention here under discussion is advanced seriously. To say that an employee, charged with handling moneys of his employer, and, of course, as a corollary, under the necessity to account for it and turn it in, has been or is short in his accounts; that he has taken his employer's money; that he has collected his em-

ployer's money and has not turned it in, and then to say that such statements do not charge him with having embezzled the funds, is to run counter to the common everyday understanding of such words. In fact, to say that a man is short in his accounts is the usual and ordinary way in which a charge of embezzlement is made. It is never necessary to prove such a charge was made in language sufficient to answer the technical requirements of a criminal pleading. If the words used make the charge in language ordinarily understood to have that effect, then the slander is made out.

In proving such a slander it is not necessary to prove the use of the exact words charged, provided that the proof does contain the sting of the charge. 16 *Cal. Juris.* 98.

In this case, however, the proof corresponded, for all practical purposes, exactly with the charge. Plaintiff proved that Harbinson said "Mr. Gray was short in his accounts with the Company." (R. 88 and 89.) That he was "short in his accounts" and "did not turn in his money". (R. 90 and 91.) That "he had not turned in his money to Swift and Company". (R. 91.) That he was "short in his accounts and had not turned the money into Swift and Company." (R. 92 and 93.) That he had been "accused of taking money from Swift." (R. 101.) That he "was short in his accounts". (R. 105 and 106.) That he "had taken some of Swift's money just before he went on his vacation and they wanted to see just how much he had taken". (R. 103.)

Every single allegation of the complaint as to slanderous utterances was proven, and most of them proven over and over again.

Appellant likewise contends in this division of its brief that as a matter of law the statements made were true. In so doing, Appellant ignores the justified and amply supported finding of the jury that it was not true that Gray had failed to turn in his money. Under the circumstances shown it was clearly for the jury to determine whether or not Gray had turned in his money and with it turned in his records of sales and collections. There was the testimony of Gray that he had done so, and the only answer which Appellant really makes is that he had violated a rule as to the manner in which he had turned the money and records in, and not that he had not, in fact, turned them in.

It is significant that despite Mr. Gray's testimony that he had turned his moneys and records into Mr. Hamilton in the same manner in which he had been turning them in for six or seven months, that the Appellant made no effort whatsoever to produce Mr. Hamilton, the cashier, to deny the testimony of Gray. Neither did it make any showing that Mr. Hamilton was not available. As a matter of fact, although it pleaded the truth of the charge, it made no showing in support of that plea whatsoever, except the highly technical implication that it again seeks to draw after a jury has passed upon the issue, to-wit, that Mr. Gray was short in his accounts and had not turned his money in, merely because he had, so the Appellant

says, violated a rule as to the manner in which that was to be done; not that he had not done the thing, but that he had not done it in a certain manner. That is all that this contention of the Appellant amounts to.

The letter of Mr. White, the Coast manager for the Appellant, is significant upon this matter. When Appellee, having heard rumors that Hamilton, the cashier, and his books, were under rigid investigation, wrote to Appellant, pleading for another opportunity of proving his innocence, and that he be granted an audience wherein his story concerning Hamilton would be at least listened to, the Appellant, through Mr. White, stated that it was under the impression that it had satisfied Mr. Gray "of the fact that you were innocent of any attempt to defraud the company".

When this investigation was under way, as has been shown by evidence heretofore referred to herein, such was not the attitude and belief of the Appellant. Had such been their attitude and belief, it is unthinkable that they would have threatened and coerced Appellee into repaying what they claimed he had taken, even to the point of threatening to blacklist him with the bonding companies.

We feel that this Court will readily understand the force of that threat and the utterly disastrous consequences to the Appellee had that threat been carried out.

It appears in the record that the Appellee had made special educational preparation for the sole purpose of becoming identified with the Appellant's institution; that he was on the way to accomplishing that

laudable ambition; and anyone having even the slightest acquaintance with the work-a-day business world, knows these things—that almost without exception, and particularly in large institutions, all employees who in the performance of their duties may have any opportunity of defrauding their employer or injuring him by dishonest acts, to say nothing of an opportunity to take money, are bonded. We venture to say that literally thousands of employees of Swift and Company are so bonded. Further, that bonding companies religiously keep detailed records of all persons, once bonded, who have been charged with dishonesty, and if those companies believe the charge is justified that they will thereafter refuse to again bond such person. Further, that such information is cleared through to all bonding companies. To be placed on the bonding companies' blacklists is to be foreclosed of all reasonable hope of again obtaining employment in a position usually bonded.

Also, when Appellant was making these investigations, we venture to say there was no doubt in the minds of its officers, when they accused Mr. Gray of being short, and we submit there is no doubt that any person to whom such a statement about Appellant was made would understand quite well just what was meant, to-wit, that he had been guilty of embezzlement.

We submit that the words uttered were false and as a matter of law were defamatory.

IV.

EVIDENCE CONCERNING EFFORTS OF PLAINTIFF TO FIND EMPLOYMENT WAS PROPERLY ADMITTED.

This matter is treated in the appendix to Appellant's brief.

Appellee was permitted to testify that after his having been slandered, and after his subsequent discharge by Appellant, he sought employment, particularly with firms and corporations engaged in the same business in the same territory as Appellant.

It was natural that he should do this, for, as he had said in his previous testimony, it was his ambition to carve out a business career in the meat packing industry, and it was in that industry that he possessed training and experience.

It appeared that Appellee first turned to the meat companies operating down the Peninsula, where he had gotten his first experience and where he knew most of the managers of the different stores and markets. (R. 114.)

He went first to Virden Packing Company and talked with the sales manager, who told him to drop back in a day or two, and then, when he did, told him he had nothing for him. (R. 115.)

Next, he went to Cudahy Packing Company. He said he told them of his experience in the business and that he wanted to stay in the meat business. They were much interested, but when Gray went back a few days later they told him they had nothing for him.

Next, he went to Hormel Packing Company, making the same statements as to Cudahy, filled out an

application, then came back and asked if he should leave his blank and was told they were afraid they had no place for him.

He went then to Hickman Products Company, told them of his experience, and came back later and was told they had nothing for him.

He went then to a Zellerbach subsidiary and was told that he was one of three who were being considered, and was asked to come back the following day, and was then told that they had given the job to someone else.

These things happened just after the slander had been committed. The slander had been widespread in a sales territory in which all these concerns were daily transacting a similar business.

Now, as a practical matter, it is almost always impossible for one who has been slandered, as was the Appellee, to prove directly that he has failed to obtain employment by reason of that slander, because such direct proof must necessarily be from the lips of those who have refused to employ him for that very reason. They simply will not tell. And we know as a practical matter again, and the law is and ever should be practical, that where the breath of scandal has touched one seeking employment in a matter germane to that employment, employers will not bother to investigate and determine the truth or falsity of such charges, but will immediately refuse employment and thereafter refuse resolutely to ever admit that they so refused because of the slander of which they had heard.

We submit that under the circumstances proof that immediately after a widespread slander in a sales community, application is made to many employers daily transacting business in that particular trade area, and where that application is received without any statement that there is no employment to be had, and after a few days, a period fitted to the usual investigation always made by the personnel departments of these great institutions of business, have elapsed and the answer invariably is that there is nothing to be had, is, first, the best proof which the nature of the case will ordinarily afford; and, second, affords justifiable inference by a jury that the failure to obtain employment was caused by the slander.

We say this, that in the ordinary course and conduct of business, where these employers knew that Gray had been calling upon the customers in this restricted trade area in which they, themselves, were dealing, they would unquestionably, in their ordinary investigation of the fitness of the applicant for employment in that trade area, make contacts through that area concerning his standing and acquaintance with the trade, and so doing would learn of this widespread slander, which, traveling with the accustomed speed of lies, would have spread throughout the area involved.

We submit that to say these things are not so is to make the law close its eyes and its ears and shut its mind.

CONCLUSION.

This case was most thoroughly tried in the Court below, to a jury composed of mature and widely experienced men of business, drawn from that world. For four days they listened to evidence, which was followed by thorough argument. It was their considered verdict that Appellee had been slandered, and that he was entitled to have it so declared. The award they gave was meager, but with it we have no quarrel, for with that award went the much more valuable result, that is, the clearing of the name of this young man from the disastrous charge of dishonesty in business and faithlessness in trust.

We submit that nothing that has been shown here would justify a reversal of that verdict.

Dated, Sacramento, California,
September 30, 1938.

Respectfully submitted,
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